

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OK FOODS, INC.

Employer

and

CASE NO. 14-RC-124829

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1000, AFL-CIO**

Petitioner

**EMPLOYER OK FOOD'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO HEARING
OFFICER'S REPORT ON OBJECTIONS**

HOWARD S. LINZY
The Kullman Firm
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162
Facsimile: (504) 596-0020

Counsel for Employer,
OK Foods, Inc.

Table of Contents

Statement of the Case.....	6
I. Background.....	10
II. Legal Argument.....	15
A. Exception 1: The Hearing Officer erroneously concluded that the Employer granted 90-day wage increases and retroactive pay to unit employees to induce them to reject the Union's organizing attempt.....	15
B. Exception 2: The Hearing Officer erred in finding that the Employer failed to demonstrate any legitimate reason to explain the timing of the 90-day wage increases and retroactive pay.....	20
C. Exception 3: The Hearing Officer erred in not accepting the testimony of Goins and Terry regarding when the Employer discovered the 90-day pay raise/ back pay issue.....	20
D. Exception 4: The Hearing Officer erred in finding that the Employer ignored its employees' complaints regarding payment of the 90-day wage increases/ back pay until the Union began its organizing efforts.....	20
E. Exception 5: The Hearing Officer erred in finding that statements made by Employer representatives Mike Martin and Mathew Perovic constituted a promise of additional wages conditioned on the Union's defeat.....	21
F. Exception 6: The Hearing Officer erred in considering the testimony of Jason Mueller and Kurtis Rorabaugh concerning statements made to them by Employer representative Diana Baker that the Employer could not resolve their wage complaint because of union activity.....	23
G. Exception 7: The Hearing Officer erred in finding that, on at least one occasion, the Employer engaged in objectionable conduct by telling an employee that it could not resolve his back wages until after the conclusion of the campaign.....	24
H. Exception 8: The Hearing Officer erred in concluding that statements made by Employer representative Diana Baker, a lower-level human resources manager at the Heavener facility, to unit employee Kenneth Rorabaugh that she could not discuss his back pay due to union activity, had a reasonable tendency to interfere with employees' free choice.....	25
I. Exception 9: The Hearing Officer erroneously concluded that the Employer engaged in objectionable conduct by impliedly promising employees a wage increase in return for their support in the election (relying on the Martin and Pervovic statements), and by telling one employee that it could not resolve his wage complaint because of employees' union activity (relying on the comment made by Baker to Kenneth Rorabaugh).....	26

J. Exception 10: The Hearing Officer erred in concluding that the CEO's statements did not negate the two innocuous statements made by other Employer representatives.....	26
K. Exception 11: The Hearing Officer erroneously concluded that the CEO's assurances made during the critical period "ring hollow" when considering the Hearing Officer's finding that the Employer granted prepetition wage increases and retroactive pay to sway the election.....	26
L. Exception 12: the Hearing Officer erroneously concluded that the CEO's assurances that the Employer would do the right thing after the election provided a "less-than-subtle" reminder that the Employer would remedy their problems if they voted against the Union.....	27
M. Exception 13: The Hearing Officer erroneously concluded that the Employer solicited employees' grievances and promised to remedy them as a means of undermining their support for the Union.....	27
N. Exception 14: The Hearing Officer erred in finding that when the CEO met with Kenneth Rorabaugh and other employees at Rorabaugh's request, that the CEO "addressed the group, explaining that he would take questions.".....	33
O. Exception 15: The Hearing Officer erred in disagreeing with the Employer that the CEO's statements that he could not make any promises immunized the Employer's actions.....	33
P. Exception 16: The Hearing Officer erred in finding that certain conduct, namely the CEO not notifying employees if or how the Employer resolved each complaint, carried little significance.....	33
Q. Exception 17: The Hearing Officer erred in finding that the Employer resolved some of the employees' complaints.....	33
R. Exception 18: The Hearing Officer erred in using the prepetition conduct of the Employer granting wage increases and retroactive pay to support his argument that the employer solicited grievances and promised to remedy those grievances.....	33
S. Exception 19: The Hearing Officer erroneously concluded that the Employer engaged in objectionable conduct by soliciting and promising to remedy employees grievances.....	34
III. Conclusion.....	35
Certificate of Service.....	36

Table of Authorities

Cases	Page
<u>Atlantic Forest Products</u> , 282 NLRB 855 (1987).....	6, 27, 32
<u>Black Hills & Western Tours, Inc.</u> , 321 NLRB 778 (1996).....	18
<u>Efco Corp.</u> , 327 NLRB 372 (1998).....	9, 30
<u>Hearthside Food Solutions, LLC & Bakery, Confectionary, Tobacco Workers & Grain Millers Int'l Union, Local 280, Afl-Cio-Clc</u> , 2012 WL 682858 (Mar. 1, 2012).....	27
<u>Holly Farms Corp.</u> , 311 NLRB 273 (1993).....	18
<u>Honeyville Grain, Inc. v. N.L.R.B.</u> , 444 F.3d 1269 (10th Cir. 2006).....	15
<u>Ideal Electric Mfg. Co.</u> , 134 NLRB 1275 (1961).....	23
<u>In Re Majestic Star Casino, LLC</u> , 335 NLRB 407 (2001).....	32
<u>Mariner Post-Acute Network, Inc. d/b/a Warren Manor Nursing Home, Inc. & Retail, Wholesale, & Dep't Store Employees Union, Afl-Cio, Petitioner</u> , 329 NLRB 3, 1999 WL 33970988 (1999).....	8, 21, 24
<u>National Micronetics, Inc.</u> , 277 NLRB 993, 1985 WL 46106 (1985).....	28
<u>New Process Co.</u> , 290 NLRB 704 (1988).....	29, 31
<u>N.L.R.B. v. Dixon Indus., Inc.</u> , 700 F.2d 595 (10th Cir. 1983).....	15
<u>N.L.R.B. v. Exchange Parts Co.</u> , 375 U.S. 405 (1964).....	18
<u>N.L.R.B. v. Handy Hardware Wholesale, Inc.</u> , 542 F.2d 935 (5th Cir. 1976).....	15
<u>N.L.R.B. v. Styletek, Div. of Pandel-Bradford, Inc.</u> , 520 F.2d 275 (1st Cir. 1975).....	7, 17
<u>Noah's Bay Area Bagels, LLC</u> , 331 NLRB 188 (2000).....	18, 19
<u>Noah's New York Bagels, Inc.</u> , 324 NLRB 266 (1997).....	28
<u>Network Ambulance Servs., Inc.</u> , 329 NLRB 1 (1999).....	20
<u>Reno Hilton Resorts Corp.</u> , 319 NLRB 1154 (1995).....	28
<u>Sears, Roebuck and Co.</u> , 305 NLRB 193 (1991).....	18

<u>Uarco, Inc.</u> , 216 NLRB 1, 1974 WL 5558 (1974).....	18
<u>United Airlines Services Corp.</u> , 290 NLRB 954 (1988).....	18

Statement of the Case

By early 2014, the Employer was aware of general union organizing activity at its plant in Heavener, Oklahoma. At this time, however, there was no indication as to *if* or *when* a petition for an election would be filed or for which group the petition would be filed. Approximately one month prior to the petition being filed, one of the eventual unit employees brought to the Company's attention a back pay issue concerning monies he believed were owed to him. An investigation immediately ensued to identify whether he had been overlooked and whether other employees were affected. It was determined that the practice of reviewing a new employee's performance after 90 days had not been uniformly followed, so reviews were conducted and wage adjustments implemented. During this same period, a sudden, unrelated change in the executive leadership (CEO) of the Company occurred. The issue of whether or not to pay retroactively to the overlooked effective date fell to the newly-appointed CEO, Mr. Trent Goins. The new CEO directed that the Company do the right thing and retroactively pay employees what they were owed. The Employer then soon realized there were additional individuals possibly who were owed back pay at the Heavener plant. When this news (that there was a second group at Heavener) was brought to the new CEO's attention, he directed that a full investigation of the entire Company be performed to ensure that all employees were paid correctly. *Then*, the Union filed the petition on March 20, 2014 and the Employer at that time became aware of *who* had been the target of the union campaign. On advice of legal counsel, and consistent with Atlantic Forest Products, 282 NLRB 855, 858 (1987), the Company decided to withhold payment of the back pay to the second group of affected unit employees during the critical period, and pay all other affected employees company-wide. The unit employees were informed by the new CEO that the Company was withholding payment to avoid the appearance

of "bribing" employees, and further informed the employees on multiple occasions that they would be paid the back pay, regardless of the outcome of the election, union or no union. The onus for the delay was not placed upon the Union and it was clear the retroactive payment would occur after the election irrespective of the vote count.

There was absolutely no attempt to influence potential voters in the Company's pre-petition actions to rectify the overlooked new-employee performance evaluations and retroactively restore back pay to employees. This was simply a situation where an employer attempted to correct mistakes in its pay practices as soon as they came to its attention, without any regard to union activity. While this was the first time this exact problem had surfaced, it is not unlike other errors which routinely occur, e.g. payroll errors that are corrected when an employee speaks up, or when an audit of the payroll system reveals an error. Under these circumstances, the Employer should be permitted to take reasonable steps to run its business properly and not be characterized as engaging in conduct motivated by union activity. See N.L.R.B. v. Styletek, Div. of Pandel-Bradford, Inc., 520 F.2d 275, 280 (1st Cir. 1975) ("Merely by coming on the scene and starting to organize, a union cannot prevent management from taking reasonable steps to run its business properly.") (citations omitted).

The Hearing Officer, however, held that the Employer's pre-petition conduct was motivated by union activity and, therefore, should be used to add "meaning and dimension" to the Employer's post-petition conduct in support of his erroneous conclusion that the post-petition conduct was objectionable. But, as stated *supra*, the Employer's pre-petition conduct was not motivated by union activity and, therefore, cannot be used to add "meaning and dimension" to the post-petition conduct. A logical extension of the Hearing Officer's reasoning would be that OK Foods, or any employer, once it became aware of any mistake could not correct it if union

activity was underway, even underway for 6 months or longer. That is not the law. An employer may conduct its ordinary business and correct errors in the same manner as before activity began. Moreover, the post-petition conduct of the Employer, standing alone, is not objectionable.

The Hearing Officer attempts to use statements made by Employer representatives as sufficient evidence of objectionable conduct. First, the Hearing Officer pointed to a statement made by Employer representatives at a post-petition meeting as constituting a promise to employees of a wage increase if they rejected the Union. The statement, however, merely communicated what "could" happen if the Union lost the election, namely that employees affected by the back pay issue could be paid what they were owed. The statement was a truthful and non-objectionable explanation that a company was free to act in any manner after an election if the union were not selected as the voting unit's representative. Moreover, the context of the statement was disregarded by the Hearing Officer. Mariner Post-Acute Network, Inc. d/b/a Warren Manor Nursing Home, Inc. & Retail, Wholesale, & Dep't Store Employees Union, Afl-Cio, Petitioner, 329 NLRB 3, 1999 WL 33970988 at **1 (1999). At these same meetings, the CEO explained on numerous occasions that affected employees would be paid, regardless of the outcome of the election.

The Hearing Officer also pointed to a remark made by a first-level human resources manager as evidence of objectionable conduct by the Employer when she told an employee that it could not resolve his wage complaint because of union activity. Not only is the statement innocuous ("due to the Union activity, [the employee] could not hear any more about [his] back pay" (Tr. 195)), but this statement too must be taken in context. See Mariner Post-Acute Network, Inc., 1999 WL 33970988 at **1. As mentioned *supra*, the CEO made it perfectly clear

on multiple occasions that affected employees would be paid, regardless of the outcome of the election. But more importantly, there is testimonial evidence that the employee in question attended one of the meetings where the CEO communicated this message immediately before approaching the human resources representative, and that the employee subsequently attended another meeting where the CEO communicated the same message. When considered in context, it would be unreasonable for the employee to conclude that the abbreviated statement by the human resources manager put the onus of the delay of the pay increases on the Union or that it had a reasonable tendency to interfere with the voters' free choice.

Finally, the Hearing Officer incorrectly concluded that the Employer engaged in objectionable conduct by soliciting and promising to remedy employees' complaints. First, the evidence on which the Hearing Officer primarily relied related to a meeting that was requested by one of the unit employees. "An employer does not unlawfully solicit grievances where, as here, employees on their own accord approach management to discuss problems." Efco Corp., 327 NLRB 372, 378 (1998). Moreover, there is no evidence in the record suggesting that the CEO solicited grievances from employees in the voting unit, made promises to correct concerns raised by the employees, or corrected any of the employees' concerns during the critical period.

For the forgoing reasons, the Hearing Officer's findings and conclusions that OK Foods engaged in objectionable conduct were contrary to the record evidence and applicable law. Accordingly, OK Foods respectfully requests that the Board not adopt the Hearing Officer's Report On Objections, grant the Company's Exceptions, and certify the May 1, 2014 election.

I. Background

Procedural Background

On March 20, 2014,¹ the Petitioner (also referred to herein as the "Union") filed a petition with the NLRB to hold an election by secret ballot which was conducted on May 1, among the employees in the following unit:

All full-time and regular part-time maintenance and refrigeration employees including leads and parts clerks employed by Employer at its facility located at 1000 Old Pike Road, Heavener, Oklahoma, but EXCLUDING office clerical employees, janitorial and sanitation employees, shipping and receiving employees, production employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

This unit is sometimes referred to herein as the "voting unit."

On May 1, a representation election was held by the Seventeenth Subregion at the Employer's facility located in Heavener, Oklahoma, with the following results:

For the Petitioner.-- 26
Against the Petitioner -- 29
Challenged ballots -- 0
Void ballots -- 0

On May 2, the Union filed objections to conduct affecting the results of the election, and requested that the Regional Director set aside the results of the May 1 election. Following an investigation by the Region, on August 20, the Petitioner requested withdrawal of Objections 1, 2, 3, 4, 6, 7 and 9. The Petitioner's request was granted in the Order Directing Hearing on Objections and Notice of Hearing that was signed on August 21, 2014 (the "Order Directing Hearing" or "Order"). The Order also required that a hearing be held on Petitioner Objections 5, 8, 10 and 11, and on certain Other Acts and Conduct Not Specifically Alleged. Both the Employer and the Petitioner made an appearance at the hearing and were given the opportunity

¹ Unless otherwise stated or the context clearly indicates otherwise, all references to dates will be in the year 2014.

to present evidence and cross-examine witnesses. On October 29, the parties filed briefs with the Hearing Officer of Subregion 17. On November 13, the Hearing Officer filed with the Board his Report on Objections.²

Factual Background

In or about late January or early February, Trent Goins attended a management meeting as Senior Vice President of Sales and Marketing for OK Foods, where the then-current CEO and other members of management were present (Tr. 301). As part of a standard update from the Vice President of Human Resources at this meeting, Goins first became aware of union activity at the employer's Heavener, Oklahoma facility (Tr. 301). The report was short and simple: there was "ongoing activity" at the Heavener facility; no discussion followed on what to do about it, and there was no discussion about any changes in wages of employees at the Heavener facility (Tr. 302). The update was for attendees' information purposes only. On February 17, Goins became the CEO of the Employer (Tr. 295).

The Employer has a 90-day evaluation process for all of its facilities, including the maintenance and refrigeration departments (Tr. 264-267, 305, 310 and 335). Typically, employees in the maintenance and refrigeration departments, along with employees in other departments, receive a performance evaluation after the first 90 days of employment, and, if the evaluation reflects acceptable performance marks, the employees are granted an increase in wages (Tr. 264-267). In early February, Diana Baker, the Company's Human Resources representative at the Heavener facility, contacted Christy Terry, the Vice President of Human Resources for OK Foods, and explained that an employee had just inquired about not getting his 90-day increase timely (Tr. 222; see Petitioner's Exhibit 4 [date of evaluation "2-14-14"] and Petitioner's Exhibit 5 [date of back pay for those in the "06-MAR-14" group generally through

² A copy of the Hearing Officer's Report On Objections is attached to this brief as Appendix 1 for reference.

"2-14-04"])). The employee, Donald Strickland, was an employee with the maintenance and refrigeration departments at Heavener (Tr. 221-222).³

At the request of Terry, Baker gathered more information on Strickland's early February inquiry (Tr. 222). Baker delivered the information to Terry and Terry asked Baker if there was anybody else in the departments who did not receive their 90-day increase timely. *Id.* Baker conducted an investigation and identified a list of people in the departments who did not receive their 90-day increase timely (Tr. 222-223; see Petitioner's Exhibit 4 and 5).⁴

On about March 1, Terry informed Goins that they had identified some employees in the Heavener maintenance and refrigeration departments who did not receive their 90-day evaluations and they may be considered for back pay (Tr. 303-305). Goins instructed Terry to "make it right" and pay these employees what was due to them (Tr. 223 and 313). Terry then submitted the relevant information to the payroll department on March 5, and paychecks were prepared on March 6 (Tr. 223, 231-232; Petitioner's Exhibit 4).

On March 7, Terry went to Heavener to present the checks to the affected employees (Tr. 231). She was unable to hand out all of the checks (Tr. 272), but to those who were present she spoke individually and told them the following:

I told them that we had made a mistake, that we had an employee come in and he did not get his 90-day increase timely, and we conducted an investigation to determine if there were anybody else. During the investigation, we did find others. So whenever we concluded how many there were and who they were, I met with Trent Goins. Trent told me that we needed to do the right thing and we needed to pay these employees correctly. That's what I was down there to do and I was very sorry.

³ All references in this Brief to page numbers in the transcript are references to pages that contain testimony and not pages that contain the index to the testimony.

⁴ Terry testified that Strickland, according to Baker, had not received his 90-day evaluation "timely" (Tr. 222). A study of Petitioner's Exhibit 5 demonstrates that, at the time Strickland spoke to Baker, he had not received the 90-day review at all and this was true for, at least, ten employees in the 06-Mar-14 group. The back pay period covered for Strickland from his 90th day of employment, 12-21-2012, through to the date of review, 2-14-2014. See also Petitioner's Exhibits 4 and 5 in regard to Joshua Deases. Deases was hired on 6-28-12 and should have been reviewed on or before 10-5-12 but was not reviewed until 2-14-14 at which time he was given his 90-day increase effective 2-17-14 and back pay was authorized from 10-5-12 to 2-14-14.

(Tr. 237-238; see also 231, 235 and 271). Baker delivered the checks which Terry could not, because the employees were not present, to remaining employees in the following week.

Shortly thereafter and no later than March 10, Terry learned from Baker that, with respect to the maintenance and refrigeration departments at Heavener, there may be additional employees who were owed back pay because a supervisor of one of the shifts had been doing raises at 180 days as opposed to the standard 90 days (Tr. 246-247, 267 and 269). Terry requested that Baker investigate further to identify who those people were (Tr. 247). Baker returned with a list of individuals who had the "180-day" problem, but Baker also informed Terry that they found others whose increase may have been late by one or two weeks, not just an additional three months. *Id.* Terry instructed Baker to include those in the list as well. *Id.*

On or about March 14, Terry went back to Goins and informed him that they learned of additional people who may be due back pay because their evaluations were not done in a timely manner (Tr. 314-315). Goins testified that he prefers to do things right the first time and was angry that all of the employees who were owed money were not paid correctly (Tr. 315). Goins instructed Terry that he did not want to go back and look at just the maintenance and refrigeration departments at Heavener but she was to include the entire Company in its multiple locations (Tr. 315). Terry spent the next couple of weeks researching the facts with her team and determining if there were any other instances. *Id.*

On March 20, the Union filed a petition with the NLRB requesting that a representation election be held.

In late March or early April, Terry concluded the second investigation and came up with a list of employees, including additional people in the maintenance and refrigeration departments at Heavener (Tr. 316). At this point, it was determined that for any employee the Company

owed money, the Company needed to assess how much was owed to them, and Terry was instructed to have those numbers reviewed by the Accounting Department. *Id.*

Once the full list was compiled for the entire Company, which encompassed other geographic locations and other departments at Heavener, the Company decided to issue back pay checks to personnel with the exception of those in the voting unit (Tr. 320). Pursuant to conversations with legal counsel, with the petition being filed, the Company chose not to issue the checks to the voting unit personnel because it potentially could be viewed as bribing employees. *Id.* The Company decided it would wait until after the election to issue the checks, whether the Company won or lost the election (Tr. 323). The checks to all other affected employees were issued in mid-April (Tr. 228). The voting unit personnel were provided their checks for retroactive pay in mid-May following the election. No additional wage increases were due because this group had already received 90-day reviews and accompanying wage increases, although the reviews and wage increases were days, weeks, or months late (Petitioner's Exhibit 5).

When Goins met with individual groups during the campaign, some employees questioned when they would receive a check (Tr. 324). Goins's answer was that the Company was committed to doing the right thing and would pay the checks after the election, regardless if the union won or lost (Tr. 324; see also Tr. 357).⁵ Additionally, Goins informed employees in the voting unit that "due to the petition being filed and the legal ramifications of what [the Company was] under, [he] felt like it would be viewed as a bribe to [provide the 90-day wage increases] during the critical period" (Tr. 359-361). After the election, employees in the voting unit who were affected each received a check (Tr. 96 and Petitioner's Exhibit 5).

⁵ This is corroborated by Terry when she testified Goins said the following: "I can't make any promises regarding wages or benefits, but I can tell you with or without the union we're going to do the right thing" (Tr. 263; see also Tr. 272-273 and 275). This is further corroborated by Mr. Kenneth Rorabaugh, (Tr. 209).

II. Legal Argument⁶

"[A] representation election is not to be lightly set aside." N.L.R.B. v. Dixon Indus., Inc., 700 F.2d 595, 599 (10th Cir. 1983). "There is a presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees." 700 F.2d at 599 (10th Cir. 1983), citing NLRB v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir.1965). "Consequently, the objecting party bears 'a heavy burden' of demonstrating that the election was not fairly conducted." 700 F.2d at 599, citing Shoreline Enterprises of America, Inc. v. NLRB, 262 F.2d 933, 942 (5th Cir.1959). See also Honeyville Grain, Inc. v. N.L.R.B., 444 F.3d 1269, 1271 (10th Cir. 2006) ("[A] party objecting to pre-election conduct bears a 'heavy burden' to prove that there has been prejudice to an election's fairness.") (citation omitted). "The burden is on the party seeking to overturn the election to show by specific evidence not only that unlawful acts occurred but also that such acts sufficiently inhibited the free choice of employees as to affect materially the results of the election." N.L.R.B. v. Handy Hardware Wholesale, Inc., 542 F.2d 935, 938 (5th Cir. 1976) (citation omitted).

A. Exception 1: The Hearing Officer erroneously concluded that the Employer granted 90-day wage increases and retroactive pay to unit employees to induce them to reject the Union's organizing attempt.

The Hearing Officer erroneously concluded that the Employer granted 90-day wage increases and retroactive pay to unit employees to induce them to reject the Union's organizing attempt (Report, 9). The Hearing Officer's conclusion is not supported by the facts or the law. While the Hearing Officer correctly held that his conclusions, erroneous as they were, could not be the basis in which to find objectionable conduct because of Kokomo Tube Co., 280 NLRB

⁶ Given the numerous errors by the Hearing Officer, each exception is addressed in the order referenced in the Employer's Exceptions to Hearing Officer's Report on Objections.

357 (1986), the Employer addresses those erroneous conclusions because the Hearing Officer used them as background (Report, 10-16).

The record evidence clearly supports the conclusion that the Employer's actions were based on a business reason without any regard to union activity. Prior to the critical period, the Employer was approached by Strickland in the maintenance and refrigeration departments regarding a possible mistake in pay. As indicated by Petitioner's Exhibit 5, the Employer immediately responded by undertaking efforts to investigate and correct this problem for those initially identified. The issue presented to Goins was whether to include, along with correcting the wage rate now and for the future, a retroactive payment. Goins's sole motivation in approving a retroactive payment, as the new CEO, was for a legitimate business purpose: to make things right by paying employees what they were owed for the oversight of which he first became aware following his promotion to CEO. Additionally, Goins took this action before the representation petition had been filed, and he had no knowledge as to *if* or *when* a petition for election might be filed or, for that matter, among what group of employees, e.g. production only to include Slaughter and Debone (Tr. 220), production and maintenance/refrigeration departments, maintenance and refrigeration departments only, clerical, etc. This is simply a situation where an employer attempted to correct, both prospectively (a decision made before Goins became CEO) and retroactively (a decision made by Goins after his promotion to CEO), a mistake in its pay practices as soon as it came to its attention, without any regard to the Union.

While this was the first time this exact problem had surfaced, it is not unlike other errors which routinely occur, e.g. payroll errors, and are corrected when an employee speaks up. Under these circumstances, the Employer should be permitted to take reasonable steps to run its business properly and not be characterized as engaging in conduct motivated by union activity.

See N.L.R.B. v. Styletek, Div. of Pandel-Bradford, Inc., 520 F.2d 275, 280 (1st Cir. 1975) ("Merely by coming on the scene and starting to organize, a union cannot prevent management from taking reasonable steps to run its business properly.") (citations omitted).

In his report, the Hearing Officer based his conclusion on the timing of the Employer's actions. For example, the Hearing Officer was "not persuaded that, as Goins and Terry testified, the Employer first learned about the 90-day raises after Goins became CEO" because "the Employer actually granted wage increases to a number of employees at least the week before Goins' [became CEO]" and, therefore, Goins and Terry's testimony should not be credited. The Hearing Officer based his findings on documents that indicate an "effective date" for pay raises being either February 11 or February 14. As suggested by the Hearing Officer, someone, namely the previous CEO, made the decision to correct, prospectively, the recently-discovered error and after February 17, Goins, upon consulting with Terry, decided to "make it right" by paying retroactively. Just as a common payroll error would be rectified by making the proper entries so that future paychecks would be in order, a retroactive payment would be made where the employee's pay had been "shorted". This is obvious from Terry's testimony, *supra*, (Tr. 237-38), that she was there to deliver retroactive checks. The wage rates had already been adjusted for future pay periods and those increased pay rates had appeared on paychecks before the petition was filed. The Hearing Officer noted testimony that Deases had complained to two supervisors, once in 2012 and, again, in 2013, possibly 27 months and 15 months, respectively, before Strickland presented his complaint to the Human Resources manager who acted upon it timely. Any suggestion that Baker or Terry knew of the 2012 or 2013 complaints by Deases would be pure speculation. Additionally, both occurred well before Goins was elevated to the CEO position.

The Hearing Officer also concluded that even assuming the testimony of Goins and Terry was correct, "this fact does not justify the timing or remove the taint from the Employer's actions" (Report, 10). However, except for Black Hills & Western Tours, Inc., 321 NLRB 778 (1996), discussed *infra*, the cases cited by the Hearing Officer concerning the impact that granting wages or benefits has on the election process are factually distinguishable from this case in that those cases relate to events occurring post-petition, and not pre-petition (See N.L.R.B. v. Exchange Parts Co., 375 U.S. 405, 409 (1964); Holly Farms Corp., 311 NLRB 273, 274 (1993); United Airlines Services Corp., 290 NLRB 954, 954 (1988); Uarco, Inc., 216 NLRB 1, 1974 WL 5558, *1 (1974); Noah's Bay Area Bagels, LLC, 331 NLRB 188, 190 (2000); and Sears, Roebuck and Co., 305 NLRB 193, 195-96 (1991). Moreover, Black Hills is inapplicable because the Board upheld an administrative law judge's decision not to consider a pre-petition wage increase in making its decision to overturn an election. 321 NLRB at 793-94 (1996).

Furthermore, the Employer has articulated a legitimate business reason for its actions, namely to correct the pay, going forward, and to pay its employees retroactively what they were owed, without any regard to union activity. The Hearing Officer found "no compelling reason to explain why the Employer needed to resolve the delayed wage increase when it did unless it intended its actions to dissuade the employees from supporting the Petitioner" (Report, 10). With due respect to the Hearing Officer, it may well be that he has never been the CEO of a business, been responsible for managing an enterprise, or charged by a Board of Directors with producing and selling a product through the efforts of a workforce whose members should be paid according to the Company's practices, with regular reviews. And, when an error is made, as will happen with humans, to correct it promptly and move to the next project. Ordinary business practice justified and explained Goins's and Terry's actions, not any reference to union activity.

A payroll issue was presented to Human Resources, no different in consequence than those which occur in a workforce of thousands on a weekly basis. The matter was brought to Terry's attention and, with a new CEO in office and the prospect of retroactive pay for approximately 10 employees, she elevated the matter to the CEO. His business acumen told him: do the right thing. Terry followed that enjoiner and had retroactive paychecks prepared which she delivered.

The Hearing Officer cites to Noah's Bay for the proposition that "[a]n employer may rebut the inference [created by the timing of a grant of benefits] by producing evidence to demonstrate some [reason other than the union] for its actions." In Noah's Bay, the employer announced a reduction in health care benefits on February 5, and implemented the reduction on April 1. A petition was filed on April 4. On April 11, the employer announced that the benefits would be restored, but notified those in the bargaining unit that the employer was not able to make the change for them. On the question of whether the employer acted lawfully in making the announcement to restore benefits during the critical period, the Board found that the employer presented a persuasive business reason for its actions unrelated to the union activity:

Given the importance of employee confidence in their health care insurance and benefit plan, the urgent expressions of companywide employee distress over their loss of the Prudential plan, and the reasonable prospect of at least some weeks passing before the finalization of the representation proceeding, we find that the Respondent has presented a persuasive business reason for immediately announcing the restoration of Prudential plan benefits companywide as soon as it received permission from the parent company on April 10 to restore such benefits. Thus, we find that the Respondent has established that the timing of the announcement and implementation of the restoration of Prudential plan benefits was governed by factors other than the union campaign.

Id. at 190. (footnotes omitted).

In the instant case, given the routine importance of paying employees what they are owed, the Employer undertook steps to correct a mistake as soon as it came to its attention,

without any regard to union activity. Moreover, the fact that the mistake was corrected on a company-wide basis, and not just for the unit employees, further credits the Employer's actions as not being tied to union activity. See Network Ambulance Servs., Inc., 329 NLRB 1, fn 4 (1999) ("where there is no other indication of an antiunion motive, a multiunit entity is unlikely to have granted a benefit to all of its employees solely for the purpose of influencing an election that affected only a few.")

B. Exception 2: The Hearing Officer erred in finding that the Employer failed to demonstrate any legitimate reason to explain the timing of the 90-day wage increases and retroactive pay.

For the reasons set forth in Exception 1, *supra*, the Hearing Officer erred in finding that the "Employer failed to demonstrate any legitimate reason to explain the timing of benefits" (Report, 9).

C. Exception 3: The Hearing Officer erred in not accepting the testimony of Goins and Terry regarding when the Employer discovered the 90-day pay raise/ back pay issue.

For the reasons set forth in Exception 1, *supra*, the Hearing Officer erred in not accepting the testimony of Goins and Terry regarding when the Employer discovered the 90-day back pay issue (Report, 9).

D. Exception 4: The Hearing Officer erred in finding that the Employer ignored its employees' complaints regarding payment of the 90-day wage increases/ back pay until the Union began its organizing efforts.

The Hearing Officer erred in finding that "the Employer ignored its employees' complaints until the Petitioner began its organizing efforts and then sought to resolve the matter by implementing the wage increase and offering unit employees retroactive pay" (Report, 10). The record does not support the Hearing Officer's finding. Although there may have been an instance in 2012 and another in 2013 where an employee brought the 90-day pay issue to supervisors attention, the record evidence clearly demonstrates that a new CEO took immediate

steps to correct a wage problem as soon as it came to *his* attention, without any regard to the union, and solely for the purpose of doing the right thing by paying employees what they were owed. As stated *supra*, Goins took these actions before the representation petition had been filed, without any knowledge as to *if* or *when* a petition for election might be filed or, for that matter, among what group of employees. Under these circumstances, the Employer should be permitted to take reasonable steps to run its business properly and not be characterized as engaging in conduct motivated by union activity.

E. **Exception 5: The Hearing Officer erred in finding that statements made by Employer representatives Mike Martin and Mathew Perovic constituted a promise of additional wages conditioned on the Union's defeat.**

The Hearing Officer erred in finding that statements made by Employer representatives Mike Martin and Mathew Perovic constituted a promise of additional wages conditioned on the Union's defeat (Report, 13). First, the Employer disputes the factual accuracy of the Hearing Officer's finding. Joshua Deases testified to the following exchange between Martin and Perovic at one of the employer meetings:

Mr. Mike Martin [] asked a question to [Perovic] . . . [T]he question was, “. . . if we were to shoot the Union down, if we were to vote ‘No,’ to the Union, would they be eligible to give us our raises -- could they give us our raises?”

[Perovic] said, “Yes.” He said [] that after the Union is gone [sic] then they were allowed to, but if they were to give us our raises now while the Union was going on, it could be considered as . . . bribery . . .

(Tr. 131). This exchange does not constitute a promise to confer benefits, but merely a discussion about what "could" happen if the Union lost the election. Moreover, this exchange must be taken in context with other statements made by the employer. Mariner Post-Acute Network, Inc., 329 NLRB 3, 1999 WL 33970988 at **1 (1999) (the Board rejected the hearing officer's finding that alleged objectionable conduct in the form of a letter should be considered in

isolation and agreed with the employer that alleged objectionable conduct should be considered in the context of other statements). In no uncertain terms, the CEO, Goins, made it abundantly clear that employees affected by the 90-day pay issue would be paid, regardless of the outcome of the election:

When I met with individual groups during the campaign, there were questions asked of when they would receive their check. My answer was that we were committed to doing the right thing and come win or lose, we would pay these checks when the election was over.

(Tr. 324; see also Tr. 357).⁷ Additionally, Goins testified that he does not recall Perovic addressing the 90-day raise/ back pay issue at the employer meetings, because Goins himself was answering these questions (Tr. 360-61).

When taken in context, it would be unreasonable for an employee to interpret the single Martin-Perovic exchange referencing what "could" happen as overriding the repeated assurances by the Employer's CEO regarding what "will" happen, namely that affected employees would be paid what they were owed, with or without a union.

Further, the statement of what could happen after an election in which the union does not receive majority support, as presented by Deases recalling the Martin-Perovic exchange, is factually and legally correct. Deases understood that if the Union was not "around, . . . the Employer can give wage increases or not give wage increases as it determines appropriate" (Tr. 152-53). It is true that after an election which the union loses, the Employer is free to do as it pleases. Without record support, the Hearing Officer dismisses the countervailing authority of Goins's statement that the grant of a wage increase was not dependent upon the outcome of the election. The Hearing Officer simply stated: "Under the circumstances of this case, I find that

⁷ This is corroborated by Terry when she testified Goins said the following: "I can't make any promises regarding wages or benefits, but I can tell you with or without the union we're going to do the right thing" (Tr. 263; see also Tr. 272-273 and 275). This is further corroborated by Kenneth Rorabaugh, (Tr. 209).

[Goins's] assurances did little to vitiate the objectionable message delivered by other supervisors" (Report, 14). There are no peculiar circumstances in the record which suggest that the Martin-Perovic exchange was not trumped by the CEO's oft-repeated statements. No special "circumstances" were cited by the Hearing Officer to support finding that Martin's simple question and Perovic's response could carry greater weight than the CEO's lawful refrain--irrespective of the election results, the wage increases would occur.

F. Exception 6: The Hearing Officer erred in considering the testimony of Jason Mueller and Kurtis Rorabaugh concerning statements made to them by Employer representative Diana Baker that the Employer could not resolve their wage complaint because of union activity.

The Hearing Officer erred in considering the testimony of Jason Mueller and Kurtis Rorabaugh concerning statements made to them by Employer representative Diana Baker that the Employer could not resolve their wage complaint because of union activity (Report, 14). The record evidence does not establish when these events took place and, therefore, must not be considered under Ideal Electric Mfg. Co., 134 NLRB 1275 (1961), which stands for the proposition that only post-petition conduct may be considered in determining whether to set aside an election.

Furthermore, the Hearing Officer erred in considering Mueller's testimony because he did not consider other, relevant testimony from Mueller regarding Baker's statements. In addition to Mueller testifying that Baker told him because of union activity, that her hands were tied and that there was nothing she could do until the union situation was resolved (Tr. 47-48, 72), Mueller, on cross examination, added to the content of this conversation by testifying that Baker told him that he was "going to get [a check], but at this time there was nothing they could do because of Union activity" (Tr. 97) and that "after the Union activity was done with, [he] would receive [his] check" (Tr. 99; see also Tr. 100). It would be reasonable for Mueller to interpret Baker's

statement that he *would* be getting a check to be consistent with CEO Goins's repeated statements that affected employees would be getting a check, union or no union, especially in the absence of any statements by Baker conditioning payment of the check on a union win or loss. Accordingly, Mueller's testimony should not be considered as affecting employees' free choice. Similarly, Kurtis Rorabaugh's testimony was not found by the Hearing Officer to have occurred within the critical period (Report, 14).

G. Exception 7: The Hearing Officer erred in finding that, on at least one occasion, the Employer engaged in objectionable conduct by telling an employee that it could not resolve his back wages until after the conclusion of the campaign.

The Hearing Officer erred in finding that, "on at least one occasion, the Employer engaged in objectionable conduct by telling an employee that it could not resolve his back wages until after the conclusion of the campaign" (Report, 14). The Hearing Officer relied solely on a statement made by Baker, a first-level human resources manager, to Kenneth Rorabaugh, after he approached her shortly after attending one of the Employer's mandatory meetings. Rorabaugh testified that Baker simply informed him that "due to the Union activity, [he] could not hear any more about [his] back pay" (Tr. 195). As noted *supra*, this statement, especially one made by a first-level human resources manager, must be considered in context with other statements, to determine whether it is objectionable. See Mariner Post-Acute Network, Inc., 1999 WL 33970988 at **1.

First, it is undisputed that Goins, the CEO, made it perfectly clear on multiple occasions that employees affected by the 90-day wage issue would be paid, regardless of the outcome of the election (Tr. 324).⁸ Additionally, Goins informed employees in the voting unit that "due to the petition being filed and the legal ramifications of what [the Company was] under, [he] felt

⁸ This is corroborated by Terry when she testified Goins said the following: "I can't make any promises regarding wages or benefits, but I can tell you with or without the union we're going to do the right thing" (Tr. 263; see also Tr. 272-273 and 275). This is further corroborated by Kenneth Rorabaugh, (Tr. 209).

like it would be viewed as a bribe to [provide the 90-day wage increases] during the critical period" (Tr. 359-361). Indeed, Kenneth Rorabaugh admitted that in the meeting he attended immediately before he approached Baker, Goins said, when asked about the back pay issue, he wanted to make it right, union or no union, and that his hands were tied legally now (Tr. 197 and 207-209). Moreover, in a separate meeting requested by Rorabaugh (Tr. 352, 354-55), Goins testified that the 90-day raises "were on hold due to legal aspects of the campaign", but that regardless of the outcome of the election ("whether union win or company win"), the Company would pay employees what they were owed (Tr. 357). When considering Baker's comment to Kenneth Rorabaugh in context with Goins' comments, it would be unreasonable for an employee to conclude that Baker's comment put the onus of the delay of the pay increases on the Union, or that Baker's words were powerful or more meaningful than the CEO's comprehensive, direct, and unmistakably clear comments, or that Baker's utterance had a reasonable tendency to interfere with employees' free choice. Accordingly, Baker's comment to Kenneth Rorabaugh must not be considered objectionable conduct.

H. Exception 8: The Hearing Officer erred in concluding that statements made by Employer representative Diana Baker, a lower-level human resources manager at the Heavener facility, to unit employee Kenneth Rorabaugh that she could not discuss his back pay due to union activity, had a reasonable tendency to interfere with employees' free choice.

For the reasons set forth in Exception 7, *supra*, the Hearing Officer erred in concluding that statements made by Employer representative Diana Baker, a first-level human resources manager at the Heavener facility, to unit employee Kenneth Rorabaugh that she could not discuss his back pay due to union activity, had a reasonable tendency to interfere with employees' free choice (Report, 14).

- I. **Exception 9: The Hearing Officer erroneously concluded that the Employer engaged in objectionable conduct by impliedly promising employees a wage increase in return for their support in the election (relying on the Martin and Pervoic statements), and by telling one employee that it could not resolve his wage complaint because of employees' union activity (relying on the comment made by Baker to Kenneth Rorabaugh).**

The Hearing Officer erroneously concluded that the Employer engaged in objectionable conduct by impliedly promising employees a wage increase in return for their support in the election (relying on the Martin and Pervoic statements), and by telling one employee that it could not resolve his wage complaint because of employees' union activity (relying on the comment made by Baker to Kenneth Rorabaugh) (Report, 14). For the reasons set forth in Exceptions 5 through 7, *supra*, these two innocuous statements made by Employer representatives do not warrant a conclusion that the Employer engaged in objectionable conduct when taken into context with the statements of the Employer's CEO.

- J. **Exception 10: The Hearing Officer erred in concluding that the CEO's statements did not negate the two innocuous statements made by other Employer representatives.**

For the reasons set forth in Exceptions 5 through 8, *supra*, the Hearing Officer erred in concluding that the CEO's statements did not negate the two innocuous statements made by other Employer representatives (Report, 14).

- K. **Exception 11: The Hearing Officer erroneously concluded that the CEO's assurances made during the critical period "ring hollow" when considering the Hearing Officer's finding that the Employer granted prepetition wage increases and retroactive pay to sway the election.**

The Hearing Officer erroneously concluded that the CEO's assurances made during the critical period "ring hollow" when considering the Hearing Officer's finding that the Employer granted prepetition wage increases and retroactive pay to sway the election (Report, 14). The Hearing Officer's conclusion is based on a false premise. As articulated in Exceptions 1 and 2, *supra*, the Employer's reason for granting the wage increase and back pay, namely to do the right

thing and pay employees what they are owed, had nothing to do with the union campaign. Consequently, this grant of benefits cannot add "meaning and dimension" to the conduct of the Employer during the critical period as suggested by the Hearing Officer.

L. Exception 12: the Hearing Officer erroneously concluded that the CEO's assurances that the Employer would do the right thing after the election provided a "less-than-subtle" reminder that the Employer would remedy their problems if they voted against the Union.

The Hearing Officer erroneously concluded that the CEO's assurances that the Employer would do the right thing after the election provided a "less-than-subtle" reminder that the Employer would remedy their problems if they voted against the Union (Report, 14). The Hearing Officer's conclusion defies logic. It is undisputed that the CEO told unit employees that the Employer would do the right thing after the election, *union or no union*. It would be illogical to conclude that unit employees could reasonably interpret the CEO's statements to mean anything other than the affected employees would be receiving back pay after the election, regardless if the union won or lost. Moreover, this is clearly permissible speech under Atlantic Forest Products, 282 NLRB 855, 858 (1987).

M. Exception 13: The Hearing Officer erroneously concluded that the Employer solicited employees' grievances and promised to remedy them as a means of undermining their support for the Union.

The Hearing Officer erroneously concluded that the Employer solicited employees' grievances and promised to remedy them as a means of undermining their support for the Union (Report, 16). When considering whether an employer engaged in conduct constituting unlawful solicitations of grievances or implied promises to resolve grievances, it is critical to consider the context in which the conduct takes place. Hearthside Food Solutions, LLC & Bakery, Confectionary, Tobacco Workers & Grain Millers Int'l Union, Local 280, Afl-Cio-Clc, 2012 WL 682858 (Mar. 1, 2012).

The Hearing Officer relied, in part, on a single statement made by Goins when he reminded employees he had been in the position of CEO for a mere six weeks (Tr. 366) and said to some unit employees, "give me a chance" (Report, 16). Goins's statement in this regard was permissible during the campaign because Goins did not make any specific promise that any particular matter would be improved. See Noah's New York Bagels, Inc., 324 NLRB 266, 267 (1997) (finding employer's request that employees give it a "second chance" not unlawful); National Micronetics, Inc., 277 NLRB 993, 1985 WL 46106 at **1 (1985) (generalized expressions such as asking employees to give the company a "second chance" or a vice president informing employees that he was "new" and asking them for "more time" are permissible campaign propaganda); *Cf. Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1156 (1995) (a series of speeches two days before an election by employer's president for a chance to "deliver" considered unlawful when taken into context with his prior references to benefits bestowed, and in the broader context of employer's unlawful promises of benefits, grants of benefits, and implied promises to remedy grievances). Indeed, Goins testified that, during the critical period, he had no discussions with employees about what he would do in the future (Tr. 370), nor did he communicate plans to employees (Tr. 367). This testimony is not contradicted. Moreover, the statement was made at Employer meetings during the first couple of weeks in April (Tr. 375), and did not take place during or after the lunch meeting principally relied on by the Hearing Officer (Tr. 375-76). Further there was no evidence adduced on the record that the lunch meeting attendees heard Goins's "give me a chance" statement. The "give me a chance" statement was invested, by the Hearing Officer, without record support, with a sinister (objectionable) connotation. It is much more likely that it was the normal introduction by the newly-appointed CEO of himself and a statement that he was new to this role and needed an

opportunity to understand his new role, i.e. managing thousands of employees and assuming executive responsibilities for the entire enterprise versus the far narrower sales role with a fraction of the total personnel as direct reports.

The Hearing Officer also relied on his finding that Goins "gave [employees] his email address so that they could communicate with him" (Report, 16). Goins testified that he told employees in the meetings "that if they wanted to contact [him], they could, and [he] gave them [his] email address" (Tr. 366). Providing employees his email address was Goins's simple, direct, and businesslike manner of assuring employees that they could contact him. This action did not imply a solicitation of grievances much less an intent or promise to adjust the grievances. Access to the CEO's easily-obtained company email address could enable communication on a great variety of issues, some as mundane as well-wishes on his promotion to others relating to serious employee matters. The only evidence of anyone availing himself of access to Goins's electronic mail was the emergency response team exchange, discussed *infra*, about which nothing further was known. Nevertheless, even if the Hearing Officer were correct, "[s]olicitation of grievances is not per se unlawful; rather, such solicitation is unlawful to the extent that it carries an express or implied promise to correct the grievances to discourage support for the Union." New Process Co., 290 NLRB 704, 738 (1988), *citing*, Uarco, Inc., 216 NLRB 1 (1974). There is no record evidence that Goins's conduct was in any way tied to a promise to resolve grievances to discourage support for the Union.

Furthermore, the Hearing Officer attempted to link Goins's conduct in providing his email address at unspecified meetings⁹ as the impetus to Kenneth Rorabaugh's in-person and public request to Goins to have a lunch meeting for the weekend shift employees (Tr. 351-52),

⁹ Goins did not testify whether he made these comments at all of these meetings or just a few.

which is the meeting principally relied on by the Hearing Officer (the "Lunch Meeting"). However, there is no evidence that Rorabaugh was at any of the meetings where Goins provided his email address. Even if Rorabaugh were at one of these meetings, it would be unreasonable to conclude that Goins's innocuous conduct in providing his email address was sufficient to cause an employee to request, in person, and not by email, a meeting with the CEO.

Indeed, there is no question that Rorabaugh initiated the Lunch Meeting (Tr. 351-52). As such, "[a]n employer does not unlawfully solicit grievances where, as here, employees on their own accord approach management to discuss problems." Efco Corp., 327 NLRB 372, 378 (1998).

In his report, the Hearing Officer misstated Goins's conduct in the Lunch Meeting. Specifically, the Hearing Officer asserted that "Goins addressed the group, **explaining that he would take questions**" (Report, 15). However, Goins's testimony reveals the true nature of the meeting to be far less troublesome than that posited by the Hearing Officer:

The first 10 to 15 minutes was general conversations just about motorcycles, sports in general. There was not any conversation while everybody was eating. We just kind of talked generalities, and then after the -- after everybody was done eating their lunch, there was some questions asked on some various things to which at the beginning of the meeting, once everybody was there, I told them that I had to -- there would be some questions I may be asked that I would have to refrain from answering because I could not promise or guarantee them anything during this time.

The record evidence simply establishes that questions were asked by employees at this meeting, and does not establish that Goins initiated these questions. In fact, the record clearly demonstrates to the contrary when considering that Rorabaugh took it upon himself to initiate the meeting in the first place, and that employees at this meeting came prepared to ask Goins questions on their own initiative.

The Hearing Officer also relied on Goins' statements that he would "look into" specific questions raised by employees at the Lunch Meeting. The employees at this meeting raised several questions. There were questions about other wage increases, to which Goins responded that he could not discuss that topic at this time (Tr. 357). The employees raised an unspecified issue about a nurse, and Goins told them that safety was a top priority, union or no union, but at no time did he communicate a plan to address whatever concern they may have had.¹⁰ *Id.* An issue was raised about staffing a nurse on the weekends, but Goins merely informed them that he would look into and get back to them without suggesting when he would get back to them. *Id.* Greg Pinto mentioned that he had been randomly drug tested three times in a month, and Goins told him that he would look into it (Tr. 358). A couple of employees inquired about not getting their 90-day raises, and Goins stated that he would look into it. *Id.* Goins did not get back to any employee before the date of the election on any matter discussed.

As noted *supra*, "[s]olicitation of grievances is not per se unlawful; rather, such solicitation is unlawful to the extent that it carries an express or implied promise to correct the grievances to discourage support for the Union." New Process Co., 290 NLRB at 738. In the instant matter, Goins did not seek a meeting with employees, it is not contradicted that he was asked by an employee, Kenneth Rorabaugh, if he would meet with a group for lunch off premises (Tr. 351). After consulting with counsel, Goins agreed to meet but not off premises (Tr. 353 - 354). Goins prefaced the meeting by stating that there may be some questions which he "would refrain from answering because [he] could not promise or guarantee them anything during this time" (Tr. 356). Goins did not, in fact, solicit grievances, and did not, in that meeting, say: "Give me a chance" (Tr. 356 - 377). Goins did pursue the issue raised concerning weekend nurse coverage but did not communicate to any voter any action on his part or the

¹⁰ The record is unclear whether this issue is the same as the nurse staffing issue that was raised

results of his investigation into that matter during the critical period (Tr. 357-358). With respect to Goins's comments regarding the 90-day increases, this is clearly permissible speech under Atlantic Forest Products, 282 NLRB at 858.

The Hearing Officer also relied on the email correspondence between Mr. Jerry Lambert, a member of the voting unit, and Goins. During the critical period, Lambert, on his own initiative, emailed Goins about an emergency response team (Tr. 365). Goins responded that he would look into it (Tr. 365). Although Goins reported back to Lambert, there is no indication in the record as to when Goins reported back to Lambert or what Goins communicated to Lambert (Tr. 365).

When considered in context, Goins's statements that he would "look into" concerns raised by employees on their own volition, were simply pronouncements by the Employer to the employees that it would investigate and determine the facts. There was no promise to remedy these concerns. Goins simply stated that he would look into the grievances, as would any prudent employer. See In Re Majestic Star Casino, LLC, 335 NLRB 407, 409 (2001) (Chairman Hurtgen dissent). Goins appeared at the Lunch Meeting at the behest of a group of his employees, some of whom presented questions or concerns. When asked a question or presented with a concern, Goins declined to provide an answer or make a promise. Rather than stand mute or "answer" with a blank stare, he made the polite but noncommittal reply: "I will check and get back" or "I would look into those situations" (Tr. 357-58).

There is no evidence in the record suggesting that Goins, during the critical period, solicited grievances from employees in the voting unit, made specific promises to correct concerns raised by the employees, or corrected any of the employees' concerns.

- N. **Exception 14: The Hearing Officer erred in finding that when the CEO met with Kenneth Rorabaugh and other employees at Rorabaugh's request, that the CEO "addressed the group, explaining that he would take questions."**

For the reasons set forth in Exception 13, *supra*, the Hearing Officer erred in finding that when the CEO met with Kenneth Rorabaugh and other employees at Rorabaugh's request, that the CEO "addressed the group, explaining that he would take questions" (Report, 15).

- O. **Exception 15: The Hearing Officer erred in disagreeing with the Employer that the CEO's statements that he could not make any promises immunized the Employer's actions.**

For the reasons set forth in Exception 13, *supra*, the Hearing Officer erred in disagreeing with the Employer that the CEO's statements that he could not make any promises immunized the Employer's actions (Report, 16).

- P. **Exception 16: The Hearing Officer erred in finding that certain conduct, namely the CEO not notifying employees if or how the Employer resolved each complaint, carried little significance.**

For the reasons set forth in Exception 13, *supra*, the Hearing Officer erred in finding that certain conduct, namely the CEO not notifying employees if or how the Employer resolved each complaint, carried little significance (Report, 16).

- Q. **Exception 17: The Hearing Officer erred in finding that the Employer resolved some of the employees' complaints.**

For the reasons set forth in Exception 13, *supra*, The Hearing Officer erred in finding that the Employer resolved some of the employees' complaints (Report, 16).

- R. **Exception 18: The Hearing Officer erred in using the prepetition conduct of the Employer granting wage increases and retroactive pay to support his argument that the employer solicited grievances and promised to remedy those grievances.**

The Hearing Officer erred in using the prepetition conduct of the Employer granting wage increases and retroactive pay to support his argument that the employer solicited grievances and promised to remedy those grievances (Report, 16). The Hearing Officer's

argument was based on a false premise. As articulated in Exceptions 1 and 2, *supra*, the Employer's reason for granting the wage increase and back pay, namely to do the right thing and pay employees what they are owed, had nothing to do with the union campaign. Consequently, this grant of benefits cannot add "meaning and dimension" to the conduct of the Employer during the critical period as suggested by the Hearing Officer.

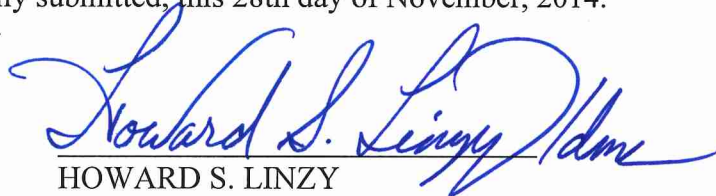
S. **Exception 19: The Hearing Officer erroneously concluded that the Employer engaged in objectionable conduct by soliciting and promising to remedy employees grievances.**

For the reasons set forth in Exceptions 13 through 18, the Hearing Officer erroneously concluded that the Employer engaged in objectionable conduct by soliciting and promising to remedy employees grievances (Report, 16).

Conclusion

For the above and other good and sufficient reasons, OK Foods respectfully requests that the Board not adopt the Hearing Officer's Report On Objections, grant the Company's Exceptions, and certify the May 1, 2014 election.

Respectfully submitted, this 28th day of November, 2014.



HOWARD S. LINZY
The Kullman Firm
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162
Facsimile: (504) 596-0020

Counsel for the Employer
OK Foods, Inc.

CERTIFICATE OF SERVICE

I certify that on this 28th day of November, 2014, I served a copy of the Employer's Brief to the Hearing Officer on the Petitioner's counsel of record by U.S. Mail, postage prepaid, and by email as follows:

Mr. Lynn Agee
Agee Owens, LLC
3340 Perimeter Hill Drive
Nashville, TN 37211
Lynn.agee@gmail.com


HOWARD S. LINZY